

² Appellant timely requested oral argument before the Board. 20 C.F.R. § 501.5(b). By order dated April 14, 2016, the Board denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 16-0343 (issued April 14, 2016). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

On appeal appellant asserts that he is entitled to disability compensation because he hurts too much to work.

FACTUAL HISTORY

OWCP accepted that appellant, a letter carrier, sustained an annular tear at L5-S1 on January 10, 2002 when he slipped and fell on ice while delivering mail. Appellant returned to modified letter carrier duties in February 2002. By decision dated December 23, 2003, OWCP determined that his actual earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity with zero loss.

Appellant missed work intermittently and received wage-loss compensation benefits. OWCP expanded the claim to include closed dislocation of lumbar vertebra, thoracic or lumbosacral neuritis or radiculitis, not otherwise specified, degeneration of lumbar or lumbosacral disc, and postherpetic polyneuropathy. Appellant had authorized back surgeries in August 2010 and August 2012. After each procedure he returned to modified duties. In December 2013 appellant had left femoral nerve decompression surgery not authorized by OWCP.

Appellant related that, in 2014, he was hired as a supervisor of customer service and no longer performed modified letter carrier duties. He then moved from Illinois to Florida, where he accepted a similar customer service supervisor position.

In March 2015 appellant transferred his medical care to Dr. Keith B. Banton, Board-certified in family medicine.

On September 21, 2015 appellant filed claims for compensation (Form CA-7s) for wage loss from May 15 to September 4, 2015.³ On September 22, 2015 he filed a Form CA-7 for wage loss from September 5 to 18, 2015. By letter dated September 22, 2015, OWCP informed appellant of the evidence needed to support a recurrence of disability claim.

In an undated statement, appellant related that he began work as a supervisor of customer service in Florida in March 2015, but was made to work as a craft employee delivering mail, unloading trucks, and scanning and throwing heavy packages. He indicated that his radiating lower back pain then became more severe. The record does not indicate that appellant returned to work.

Medical evidence submitted included a May 7, 2015 report in which Dr. Banton noted appellant's complaint of low back pain with bilateral leg numbness. Dr. Banton provided examination findings and noted that appellant would follow-up in one month. On July 9, 2015 he noted that appellant was seen for complaints of congestion, headache, and productive cough. Dr. Banton described examination findings and noted active problems of backache, pain involving the lower leg, spondylosis without myelopathy, osteoarthritis, allergic rhinitis, gout,

³ The Board notes that the record contains a Form CA-7 submitted by appellant on September 21, 2015 claiming wage-loss compensation from May 15 to September 4, 2015. OWCP did not adjudicate that period of disability in the decision before the Board in the present appeal. The Board's jurisdiction extends only to the review of final decisions by OWCP. 20 C.F.R. § 501.2(c); *E.L.*, 59 ECAB 405 (2008).

tobacco use, obesity, essential hypertension, acute respiratory infection, lumbago, and low back pain.

An August 18, 2015 computerized tomography (CT) scan of the right lower extremity demonstrated chondrocalcinosis, no acute fractures, joint effusion, and intact anterior/posterior cruciate ligament on limited view.

William Wright, a physician assistant in Dr. Banton's office, provided treatment notes dated May 20 to September 10, 2015 in which he recorded a history of back injury in 2002 and appellant's complaint of radiating back pain. He described tenderness to examination at L4-5 and L5-S1. On August 11, 2015 Mr. Wright described appellant's respiratory complaints and right knee pain. On disability slips dated June 17, July 23, and September 10, 2015 he advised that appellant had been incapacitated from performing any work since May 15, 2015.

In an October 9, 2015 report, Dr. Charles Wingo, a Board-certified orthopedic surgeon, noted a history that appellant had been off work for four months due to lower back and left buttock pain associated with left great toe numbness. He reported that appellant had been injured many years previously and had stopped work because the postmaster wanted him to do heavy work in addition to his supervisory duties. Dr. Wingo described appellant's medical and surgical history, noting prior spinal surgery at C6-7 and L5-S1. Physical examination demonstrated a normal gait and full range of cervical and lumbar mobility. Straight leg raising was positive for a root tension sign on the left, with no spasm, mass, or tenderness present in the lumbar or thoracic region. Upper and lower sensibility was normal. Dr. Wingo diagnosed lumbar radiculopathy and released him to return to work on Monday, October 12, 2015 with no restrictions.

On October 12, 2015 Dr. Banton noted that appellant was seen for check-up and medication refills. He described physical examination findings and diagnosed low back pain, essential hypertension, pain in right knee, and obesity. Dr. Banton recommended follow-up in one month or as needed.

In a merit decision dated November 3, 2015, OWCP denied appellant's claim for compensation, finding that he had not established that he was totally disabled September 5 to November 3, 2015 due to the January 10, 2002 employment injury. It also noted that the claimed factors that occurred in appellant's new employment in Florida constituted new or different work factors and were not due to his 2002 injury.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.⁴ Board precedent and OWCP procedures provide, "If a formal loss of wage-earning capacity (LWEC) decision has been issued, and the claim is for recurrent disability, it should be processed in accordance with procedures for modifying a formal

⁴ See Sharon C. Clement, 55 EAB 552 (2004).

LWEC.”⁵ Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

OWCP, however, is not precluded from adjudicating a limited period of employment-related disability when a formal wage-earning capacity determination has been issued.⁷

Under FECA the term “disability” means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.⁸ Furthermore, whether a particular injury causes an employee to be disabled from employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹

ANALYSIS

OWCP accepted that a January 10, 2002 employment injury caused an annular tear at L5-S1, closed dislocation of lumbar vertebra, thoracic or lumbosacral neuritis or radiculitis, not otherwise specified, degeneration of lumbar or lumbosacral disc, and postherpetic polyneuropathy. By decision dated December 23, 2003, OWCP determined that appellant’s actual earnings as a modified letter carrier fairly and reasonably represented his wage-earning capacity with zero loss.

On September 22, 2015 appellant filed a Form CA-7 claim for compensation for the period September 5 to September 18, 2015. In adjudicating this claim in its November 3, 2015 decision, OWCP determined that appellant was not entitled to disability compensation for the period commencing September 5, 2015. Thus, in the case at hand, appellant is claiming a limited period of disability, and OWCP properly determined that this claim should not be developed as a request for modification of wage-earning capacity determination. Rather, appellant has the burden of establishing that his disability for the limited period in question was causally related to the accepted January 10, 2002 employment injury.¹⁰

⁵ T.W., Docket No. 12-1162 (issued December 19, 2012); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (February 2013).

⁶ *Sue A. Sedgwick*, 45 ECAB 211 (1993).

⁷ *J.B.*, Docket No. 15-1817 (issued April 1, 2016); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

⁸ See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁹ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹⁰ *J.B.*, *supra* note 7.

The Board finds that the medical evidence of record is insufficient to establish disability for the period claimed.

The issue of disability from work can only be resolved by competent medical evidence.¹¹ Whether a claimant's disability is causally related to an accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.¹² A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.¹³

Appellant submitted several reports and disability slips from Mr. Wright, a physician assistant. The Board has long held that physician assistants are not considered "physicians" as defined under FECA, and their opinions are of no probative value.¹⁴ Thus, Mr. Wright's reports are insufficient to meet appellant's burden of proof.

While Dr. Banton noted appellant's complaints of low back pain, he did not reference the January 2002 employment injury and accepted conditions, or offer an opinion on disability. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed.¹⁵

As to Dr. Wingo's October 9, 2015 report, while he indicated that appellant had been injured many years prior and noted appellant's report that he was required to do heavy work in addition to supervisor duties, Dr. Wingo also advised that appellant could return to work with no restrictions.

As appellant has not submitted rationalized medical opinion evidence sufficient to establish that he was unable to work for the period September 5 to November 3, 2015 due to the accepted conditions, he failed to establish that the claimed disability was employment related. He was thus not entitled to wage-loss compensation for this period.¹⁶

¹¹ *R.C.*, 59 ECAB 546 (2008).

¹² *See Sandra D. Pruitt*, *supra* note 7.

¹³ *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

¹⁴ *Roy L. Humphrey*, 57 ECAB 238 (2005). Section 8101(2) of the FECA provides that "physician" includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

¹⁵ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹⁶ *N.R.*, Docket No. 14-114 (issued April 28, 2014).

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant failed to establish entitlement to wage-loss compensation for disability commencing September 5, 2015 due to his January 10, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board